



U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

March 6, 2018

BY ECF and BY E-MAIL

The Honorable Kimba M. Wood
United States District Court
Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, New York 10007

Re: United States v. Steven Brown, S6 16 Cr. 436 (KMW)

Dear Judge Wood:

As this Court is aware, the defendant has moved, *inter alia*, to dismiss the portions of Counts One, Two, and Five of the Superseding Indictment on statute of limitations grounds.¹ On March 5, 2018, the Court issued an order directing the parties to submit additional briefing addressing whether wire fraud is a continuing offense for statute of limitations purposes under *Toussie v. United States*, 397 U.S. 112 (1970) and whether any court in this Circuit has ruled on the issue. As set forth in further detail below, wire fraud is a continuing offense for statute of limitations purposes, and the defendant's motion to dismiss the wire fraud charged in the above-captioned indictment should be dismissed.

Wire fraud is a continuing offense for statute of limitations purposes. In *United States v. Hoey*, No. 15 Cr. 229 (PAE), Judge Engelmayer issued a ruling from the bench addressing precisely the question posed by the Court in its March 5, 2018 order.² In *Hoey*, the defendant was alleged to have embezzled money from a pension plan and, based on those allegations, was charged with, among other things, a wire fraud offense that began in 2009 and ended in 2012. *United States v. Hoey*, No. 15 Cr. 229 (PAE), Indictment (S.D.N.Y. April 13, 2015) (Dkt. No. 1). The defendant moved *in limine* to exclude testimony regarding the acts that occurred in 2009, which he contended were barred by the statute of limitations. See Exhibit A at 8-9. In denying the defendant's motion, Judge Engelmayer noted that, with regard to the count "charging wire fraud, the 2009 embezzlement falls within the scope of the crime charges as part of a 'continuing offense.'" *Id.* at 9. Judge Engelmayer continued:

¹ Count One charges Brown with conspiring to commit wire fraud, between in or about 2009 and in or about 2016. Count Two charges Brown with participating in a wire fraud scheme between in or about 2009 and in or about 2016. Count Five charges Brown with conspiring to commit money laundering, from at least in or about 2009 until in or about 2016.

² A copy of the relevant portions of the transcript of the March 1, 2016 proceeding at which Judge Engelmayer issued this ruling is attached to this letter as Exhibit A.

As the Supreme Court explained in *Toussie v. United States*, 397 U.S. 112 at 115 (1970), an offense is continuing for statute of limitations purposes only where “the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.” As to such offenses, conduct which would otherwise be outside the limitations period may be charged, and may serve as the basis for a finding of guilt, when the offense began outside the limitations period but continued into it. Under the case law, wire fraud qualifies as a crime that, under the statute, can constitute a continuing offense. *See, e.g., United States v. Abrams*, 539 F. Supp. 378, at 383 to 384 (S.D.N.Y. 1982).

Ex. A at 9-10. Judge Engelmayer noted that the wire fraud charge at issue in *Hoey* was of the same “continuing offense” character as that envisioned in *Toussie* insofar as the indictment alleged an ongoing scheme to defraud, involving multiple instances of misappropriation—some outside the limitations period and some within it. *Id.* at 10. The court further noted that earlier “2009 conduct was of a similar character to the 2010 and 2012 conduct, so as to supply a clear factual basis on which the government may argue that there was a single, integrated continuing wire fraud scheme dating back to 2009.” *Id.* at 11.

Judge Engelmayer’s ruling that wire fraud is a “continuing offense” for statute of limitations purposes is consistent with the holdings of other courts in this Circuit, finding that offenses involving the carrying out of a scheme to defraud are continuing offenses. *See United States v. Abrams*, 539 F. Supp. 378, 383-84 (S.D.N.Y. 1982) (denying a motion to dismiss wire fraud counts on statute of limitations grounds because the mere “fact that a scheme may extend back beyond the limitation period does not outlaw an offense committed in furtherance of that scheme within the period” and, in that case, the allegations included that the defendant made several telephone calls in furtherance of the wire fraud within the limitation period and “committed other acts in furtherance more than five years prior to the filing of the indictment.”); *see also United States v. Kogan*, No. 16 Cr. 221 (RWS), 2017 WL 6547743, at *6 (S.D.N.Y. Dec. 21, 2017) (denying a motion to dismiss conspiracy to commit healthcare fraud and substantive healthcare fraud charges—which employ the same “scheme or artifice” language as the wire fraud statute—on statute of limitations grounds because those “are continuing offenses, such that any one act committed in the course of a conspiracy within the statute of limitations brings the whole conspiracy into the limitations period”).³

³ The Court’s March 5, 2018 order directed the parties to brief, specifically, the question of whether wire fraud, which is charged in Count Two of the Superseding Indictment, is a “continuing offense.” As this Court is aware, the defendant is also seeking to dismiss based on statute of limitations ground certain allegations underlying Count One, which charges conspiracy to commit wire fraud, and Count Five, which charges Conspiracy to Commit Money Laundering. As set forth in the Government’s Memorandum of Law in Opposition to the Defendant’s Motion to Dismiss, Counts One and Five each charge a single, ongoing conspiracy, in which the last overt act occurred well within the statute of limitations. *See* (Govt. Br. at 6-9). Moreover, “[i]t is well settled that a conspiracy charge is timely filed if only one of a number of overt acts occurred within

